86-1445

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

FIRST TEAM AUCTION, INC.,
Petitioner,

v.

FIRST STATE BANK OF CLAY COUNTY
(FORMERLY FIRST STATE BANK OF
LINEVILLE),
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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5 pp

QUESTION PRESENTED FOR REVIEW

Whether the courts below exceeded their jurisdiction and statutory authority when they resolved disputed and genuine issues of material fact in favor of the respondent-movant on a motion for summary judgment.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal:

First Team Auction, the Petitioner herein Ellis, Easterlin, Peagler & Gatewood, P.C. Ben F. Easterlin IV, attorney for Petitioner Larry Morris, attorney for Petitioner Thomas Reuben Bell, attorney for Respondent James J. Odom, Jr., attorney for Respondent

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, FIRST TEAM AUCTION, INC., prays that a writ of certiorari issue to review the December 10, 1986 judgment of the United States

Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, First Team Auction v. First State Bank of Lineville, 808 F.2d 60 (11th Cir. 1986), is a per curiam affirmation of the district court opinion. A copy of the order of the Court of Appeals is attached hereto as Appendix A. The opinion and order of the district court, First Team Auction v. First State Bank of Clay County, No. CV85-H-2383-E (N.D. Ala. Apr. 24, 1986) is attached hereto as Appendix B.

JURISDICTION

The judgment of the district court in favor of Respondent was entered April 24, 1986. The Court of Appeals affirmed the district court's judgment, per curiam, on December 10, 1986. The

jurisdiction of this court is involved pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VII provides, in pertinent part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Fed. R. Civ. P. 56(c) provides, in pertinent part:

> **Motion and proceedings thereon**
>
> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Fed. R. Civ. P. 56(e) provides, in pertinent part:

> **Form of affidavits; further testimony; defense required**
>
> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a

genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Ala. Code § 6-2-3 (1975) provided, in pertinent part:

Accrual of claim--Fraud.

In actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have one year within which to prosecute his action. (Code 1852, § 2492; Code 1867, § 2916; Code 1876, § 3242; Code 1886, § 2630; Code 1896, § 2813; Code 1907, § 4852; Code 1923, § 8966; Code 1940, T.7, § 42.)

Ala. Code § 6-2-3 (Supp. 1986) provides, in pertinent part:

Accrual of claim--Fraud.

In actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have two years within

> which to prosecute his action. (Code 1852, § 2492; Code 1867, § 2916; Code 1876, § 3242; Code 1886, § 2630; Code 1896, § 2813; Code 1907, § 4852; Code 1923, § 8966; Code 1940, T. 7, § 42; Acts 1984, 2nd Ex. Sess., No. 85-39, p. 40, § 2.)

Ala. Code § 6-2-39(a)(5) (1975) (repealed) provided, in pertinent part:

> (a) The following must be commenced within one year:
>
> . . . .
>
> (5) Actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section[.]

Ala. Code § 6-2-38(l) (Supp. 1986) provides, in pertinent part:

> (l) All actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years.

STATEMENT OF THE CASE

On September 6, 1985, Petitioner filed a complaint in the United States District Court for

the Northern District of Alabama alleging that in July 1983, Appellee fraudulently misrepresented the value of certain real property securing a note sold at that time to Petitioner by Respondent. Jurisdiction was founded on diversity of citizenship and jurisdictional amount in controversy. 28 U.S.C. § 1332. Respondent defended on the grounds, inter alia, that the complaint was barred by the Alabama statute of limitations. Subsequently, Respondent filed a motion for summary judgment on the grounds that Petitioner knew, or should have known, of any fraud as of January 9, 1984, and that Petitioner's complaint was violative of the Alabama one-year statute of limitations for fraud claims. The district court granted summary judgment to Respondent, and the court of appeals subsequently affirmed, per curiam, the district court's judgment.

FACTS:

First Team Auction, Inc. [hereinafter "Petitioner"] is an auction company located in Americus, Georgia and is in the business of conducting consignment auctions of farm equipment, construction equipment, livestock and real estate. R1-11-2.[1] Prior to July 1983, Petitioner operated almost exclusively in the State of Georgia and had never sold any real property in Alabama. R1-14-6. In the spring of 1983, Petitioner began negotiating with Madison H. Hooton, Sr., Marion P. Hooton, Madison H. Hooton, Jr., and Marion E. Hooton d/b/a The Hooton Company ("Hooton") to sell approximately three thousand acres of timberland ("the timberland") owned by Hooton in Randolph, Clay, and Tallapoosa

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[1]References are, unless otherwise noted, to the record as it was labelled in the Court of Appeals.

Counties, Alabama. At the time, Hooton was primarily engaged in the production and sale of chickens and eggs and had accumulated large indebtedness to certain lenders and to certain suppliers of chickens, feed and other similar items. These creditors ("the lienholders") had secured Hooton's indebtedness to them through mortgages and judgments on the timberland. Hooton expressed to Petitioner a desire to sell some of the timberland in order to reduce his total indebtedness. In early or middle June 1983, Hooton and Petitioner agreed that Petitioner would auction the timberland in July 1983. R1-11-2. At the same time, Hooton and Petitioner executed a second contract whereby Petitioner was to auction other property of Hooton in the spring of 1984. This property was residential and recreational development property on a lake (the "lakefront property"), and it was

mortgaged to the First State Bank of Lineville ("Respondent"). R1-11-3. Respondent agreed to release its mortgage to facilitate the spring 1984 auction. R1-11-3, 4. R1-11-2.

On or about July 5, 1983, Ken Vaughn, President of Respondent bank, informed Petitioner that, despite its earlier agreement to release its lien on the lakefront property in the spring of 1984, that foreclosure of Respondent's mortgage on the lakefront property was now imminent. Hooton, Petitioner and Respondent then entered into negotiations to forestall the foreclosure. R1-11-4. During these negotiations Respondent showed Petitioner an MAI[2] appraisal representing the fair market value of the lakefront property to be in excess of one million

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[2]"Member Appraisal Institute" denotes an organization for real estate appraisers of the highest standards.

dollars. Respondent emphasized that this was a MAI appraisal and that the appraisal was therefore totally reliable as an indication of the value of the property. R1-11-5. Concerned that Respondent's threatened foreclosure of Hooton's lakefront property would chill the sale of the timberland in the July 1983 auction, Petitioner purchased the Hooton mortgage to Respondent. R-11-6, 7.

In purchasing this mortgage, Petitioner did not have time to make an independent determination of the value of the lakefront property and relied entirely on the MAI appraisal and the representations of Respondent. On July 23, 1983 First Team conducted the auction of the timberland, but shortly thereafter Hooton filed a Chapter 11 petition in the United States Bankruptcy Court, nullifying all sales at this auction.

In August 1984, Appellant was finally able

to obtain a release of both the timberland and the lakefront properties from the Bankruptcy Court and sell them at auction. The lakefront property sold for considerably less than the value represented to Petitioner by Respondent, and Petitioner did not recover the sum it paid to Respondent to purchase the mortgage on this property. This was Petitioner's first indication or knowledge that the lakefront property was worth less than the value represented by Respondent in July 1983. R1-11-9, 10. In May of 1985, Hooton told Petitioner that Respondent knew in July 1983 that the MAI appraisal of the lakefront property overstated its value and the Respondent tricked Petitioner into purchasing this mortgage in order to transfer the potential loss on Hooton's debt to Petitioner. R1-11-11. This was Appellant's first knowledge of Appellee's fraudulent misrepresentation of the value of the lakefront

property. R1-11-11.

The parties and the trial judge below were all in agreement that January 9, 1984 was the critical date for determining whether or not Petitioner's fraud cause of action was time-barred. When the contract for sale of the mortgage was entered into in July 1983, the Alabama statute of limitations for action based on fraud was one year. Ala. Code § 6-2-39(a)(5) (1975) (repealed by Act No. 85-39, 1984-85 Ala. Acts (2nd Special Sess. 40). As of January 9, 1985, fraud claims are governed by the two-year statute of limitations of Ala. Code § 6-2-38(l) (Supp. 1986). Because of the Alabama fraudulent concealment statute, Ala. Code § 6-2-3 (1975 & Supp. 1986), a cause of action for fraud is tolled until the fraud either is discovered, or should have been discovered.

Again, the parties agreed that, if

Petitioner did not, utilizing due diligence, discover the fraud perpetrated by the Respondent before January 9, 1984, Petitioner would gain the benefit of the new two-year provision of both Ala. Code §§ 6-2-38(1) and 6-2-3, and the cause of action would not be time-barred. See Tyson v. Johns-Manville Sales Corp., 399 So. 2d 263, 268-69 (Ala. 1981) (limitations period may be extended by legislature retroactively as long as claim not already time-barred when legislature acts). Cf. Bajalia v. Jim Magill Chevrolet, Inc., 497 So. 2d 489, 491 (Ala. 1986) (cause of action for fraud filed after expiration of one-year period following discovery of fraud not revived by subsequent amendment of Ala. Code § 6-2-39 (Supp. 1986)). The critical issue, therefore, is whether the district court, and court of appeals properly concluded that, as a matter of law, Petitioner should have discovered the fraud

of Respondent prior to January 9, 1984.

REASONS FOR GRANTING CERTIORARI

In reaching its per curiam decision affirming the judgment of the district court granting the Respondent summary judgment, the court of appeals has decided a question of federal law in conflict with past decisions of this Court and other courts of appeals; furthermore, the court below "has so far departed from the accepted and usual course of proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 17.1(a).

It has always been clear that Fed. R. Civ. P. 56, which governs the procedure of summary judgment, may not sanction a violation of U.S. Const. amend VII: i.e., a trial judge may not, under the guise of a summary judgment motion,

"cut litigants off from their right of trial by jury if they really have issues to try." Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944) (finding summary judgment inappropriate where it invaded province of the jury). Therefore, in order to ensure that a litigant's right to trial is not violated, Fed. R. Civ. P. 56 must be interpreted to foreclose summary judgment where there do exist disputed issues material to the resolution of the case. Furthermore, even if the nonmoving party will bear the ultimate burden of persuasion at trial with respect to an issue, summary judgment is only appropriate in the absence of a conflict in the materials considered on the motion. Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). In deciding whether there is a genuine issue of material fact, the court must view the evidence presented in the light most

favorable to the nonmoving party and resolve all conflicts in favor of that side. Id. This is precisely what the courts below failed to do. This is not a case such as Celotex, in which the nonmoving party introduced no summary judgment evidence in support of the position it bore the burden to establish at trial. Here, the allegations of Respondent--that the Petitioner should have discovered the fraud prior to January 9, 1984--were rebutted by the affidavits submitted to the court by Carlus D. Gay, Jr., the President of First Team Auction, the Petitioner (excerpts from which are attached hereto as Appendices C and D).

The key to the controversy is contained in the meaning of Ala. Code § 6-2-3 (1975 & Supp. 1986). This is a fraudulent concealment statute, but it is clear that it operates in the same manner as a "discovery rule" when the underlying

basis of the cause of action is fraud itself:

> Under § 6-2-3, Code 1975, an action for fraud must be brought within one year from the discovery of the fraud. The statute of limittions will not begin to run until the plaintiff knows of facts which would have put a reasonable mind on notice of the possible existence of fraud.
>
> Facts showing a fraud are considered to be discovered when they should have been discovered by one who has acquired knowledge sufficient to provoke inquiry in the mind of a person of ordinary prudence. Butler v. Guaranty Savings & Loan Ass'n, 251 Ala. 449, 37 So.2d 638 (1948). One who is being deceived, however, may be lulled into a false sense of security. Consequently, "[a] party thus situated is not required to presume fraud or suspect it, until something comes to him leading a just person to suspect and make inquiry." Williams v. Bedenbaugh, 215 Ala. 200, 110 So. 286 (1926).

Earle, McMillan & Niemeyer, Inc. v. Dekle, 418 So. 2d 97, 99-100 (Ala. 1982) (emphasis added) (holding that purchasers of real property who alleged fraudulent misrepresentations of

brokerage firm and real estate salesman fell within fraudulent concealment exception where there was no reason for plaintiffs to have questioned representations). While it is true that the ultimate burden of persuasion at trial regarding the tolling of the statute is upon the plaintiff relying on the exception, Amason v. First State Bank of Lineville, 369 So. 2d 547, 550-51 (Ala. 1979), the question of whether plaintiffs should have discovered the fraud in question within a certain time is one for the jury when plaintiff's evidence is "sufficient to raise a reasonable inference in support of their position that they did not discover a condition which put them on notice of possible fraud[.]" Elrod v. Ford, 489 So. 2d 534, 537 (Ala. 1986). Furthermore, whether the Petitioners in the case sub judice exercised due diligence in discovering the fraud must be analyzed in the following

statement of the law in Alabama:

> Broadly speaking, the facts constituting the fraud are to be considered as discovered when they ought to be discovered, when such facts come to knowledge as provoke inquiry in a person of ordinary prudence, and which, if followed up, would lead to the discovery of the fraud. But this rule is not to be so applied as to defeat the ends of the statute. Fraud, in the nature of it, implies that the party has been misled and that, by the wrong of another, he is accepting and resting in a false sense of security. A party thus situated is not required to presume fraud or suspect it, until something comes to him leading a just person to suspect and make inquiry.
>
> Dealing with the case before us, only a period of some four months elapsed from the time of the purchase of the stock until the twelve months' period provided by the saving clause of the statute began. This is not per se an unreasonable time for the discovery of the fraud or such time as calls for explanation of long acquiescence and delay. In such case, we think the rule stated in Maxwell v. Lauderdale, supra, quite strict enough; viz., the replication should show how and when the facts constituting the fraud became known, with a general denial of the knowledge of such facts theretofore.

Williams v. Bedenbaugh, 215 Ala. 200, 110 So. 286, 289 (1926) (emphasis added).

The district court, in holding that Respondent was entitled to summary judgment, does not even refer to the affidavits of Petitioner's president filed in opposition to summary judgment [Appendices C-D]. The district court in essence held that Petitioner should have discovered the fraud prior to January 9, 1984 because: (1) an agent of the Petitioner purchased certain lakefront property in July 1983 that should have put Petitioner on notice of the fraud (Appendix B-6); (2) Petitioner is a "sophisticated corporation with considerable experience in the purchase, sale and development of real estate," (Appendix B-7); and (3) Petitioner had its representatives on the land involved by July 1983 (Appendix B-7). The court concluded that Petitioner should have attempted to discover the

fraud before 1984. However, it is clear that under Alabama substantive law which the district court was constitutionally bound to apply in this diversity case, Erie Railroad v. Tompkins, 304 U.S. 64 (1938); that the Petitioner was under no absolute duty to investigate possible fraud where there was no indication, until well into 1984, that any fraud existed. Earle, McMillan & Niemeyer, Inc. v. Dekle, supra; Williams v. Bedenbaugh, supra. Furthermore, on most of the "facts" found by the district court in reaching its conclusion, the court was just plain wrong, as demonstrated by the affidavits by Petitioner's president. For example, Petitioner denied that any lakefront property was sold in July 1983 (Appendix C-1). Thus, Petitioner, contrary to the finding of the court, did not have constructive knowledge that the lakefront property would sell for less than the appraisal. Second,

Petitioner denied that it had any experience in the sale of lakefront property, and did not have "considerable experience in the purchase, sale and development of real estate" (Appendix B-7; C-2). Finally, Petitioner denied that any of its representatives inspected the lakefront property until the spring of 1984; a fact which Respondent was aware of (Appendix D-1-3; C-2-3).

Thus, all of the basis of the district court's decision were the subject of hotly-disputed issues. By resolving the disputes in favor of the moving party the district court, and the court of appeals in affirming the trial court's decision, violated the meaning and spirit of Fed. R. Civ. P. 56.

Other circuit courts of appeals, in considering whether summary judgment was appropriate when the nonmoving party claimed that the injury was not discoverable before a particular point in

time, have disagreed with the analysis of the district court in this case. For example, in Braxton-Secret v. A.H. Robins Co., 769 F.2d 528 (9th Cir. 1985), it is stated that questions involving a person's state of mind are generally factual issues inappropriate for summary judgment, and such judgment should not be granted where contradictory inferences can be drawn from even undisputed facts. Id. at 531 (concluding that plaintiff's fraudulent concealment defense did not preclude summary judgment where plaintiff gained actual independent knowledge of the wrong dispute concealment); see also Allen v. A.H. Robins Co., 752 F.2d 1365 (9th Cir. 1985) (reversing summary judgment in favor of manufacturer to permit plaintiff to set up fraudulent concealment defenses); Lundy v. Union Carbide, 695 F.2d 394 (9th Cir. 1982) (trial court's grant of summary judgment improper where there existed fac-

tual dispute as to whether plaintiff should have discovered medical injury prior to a particular date); Admiralty Fund v. Jones, 677 F.2d 1289 (9th Cir. 1982) (it was not clearly shown in securities fraud action that buyer was put on notice of defendant's alleged misrepresentations regarding corporate shares; thus, plaintiff's due diligence, or lack thereof, was substantial issue of material fact, precluding summary judgment).

Other circuits are in accord. The Fifth Circuit, prior to the split-off and creation of the Eleventh Circuit, held in In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1170 (5th 1979), cert. denied, 449 U.S. 905 (1980), that the question of when the statute of limitations began to run in the face of a claim of fraudulent concealment "is a factual one, . . . and is therefore not determinable on a motion for summary judgment" (citation omitted).

With respect to the Court of Appeals, District of Columbia Circuit, see Hartford Life Insurance Co. v. Title Guarantee Co., 520 F.2d 1170 (D.C. Cir. 1975) (reversing summary judgment where issue of whether plaintiff should have learned of fraudulent conduct earlier than it did was not established as a matter of law); Emmet v. Eastern Dispensary & Casualty Hospital, 396 F.2d 931 (D.C. Cir. 1967) (genuine issue of fact remained as to plaintiff's fraudulent concealment claim barring summary judgment). The Second Circuit is in agreement, Robertson v. Seidman & Seidman, 609 F.2d 583 (2d Cir. 1979) (summary judgment erroneously granted where conflicting inferences could be drawn from affidavits as to whether plaintiff exercised due diligence in discovering cause of action).

In the Seventh Circuit, see Sperry v. Barggren, 523 F.2d 708 (7th Cir. 1975) (whether

alleged fraud was concealed or was of such a nature as to conceal itself, thus tolling statute of limitations, could not be resolved on summary judgment because of questions of fact); Gates Rubber Co. v. USM Corp., 508 F.2d 603 (7th Cir. 1975) (evidence of fraudulent concealment raised factual issue, precluding summary judgment). See also Exnicious v. United States, 563 F.2d 418 (10th Cir. 1977) (material fact existed as to whether claimant should have discovered condition before he did, precluding summary judgment).

The Eleventh Circuit cases cited by the district court below are clearly distinguishable. In Sewers v. A.H. Robins Co., 715 F.2d 1559 (11th Cir. 1983), the plaintiff claimant's cause of action was products liability--not fraud. Thus, she was required, under Alabama law, to allege and plead the acts constituting fraudulent concealment on the part of the defendant manufac-

turer. This, like the plaintiff in Celotex Corp. v. Catrett, supra, she wholly failed to do. There were thus no disputed issues as to when she should have discovered the fraud, since she had not alleged any fraud at all. 715 F.2d at 1561-62. The fraud in the case sub judice lies in the underlying cause of action; no party has suggested that the facts constituting that cause of action have not been alleged.

Furthermore, Hunt v. American Bank & Trust Co. of Baton Rouge, 783 F.2d 1011 (11th Cir. 1986) is likewise not controlling here. In that case, the original receiver had already determined, outside the limitations period, facts indicating that certain transactions were fraudulent, or suspected them to be so. In the present case, Petitioner has submitted competent summary judgment evidence that there were no such suspicions until the spring of 1984. Because of

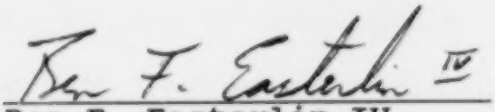
the high reputation for accuracy attributed to MAI appraisals, Petitioner had no reason to look for fraud where none appeared on the face of the transaction, and had no duty to do so under Alabama law. Earle, McMillan & Niemeyer, Inc. v. Dekle, supra, 418 So. 2d at 100.

In sanctioning per curiam the actions of the district court, it is submitted that the court of appeals has acted inconsistently with the decisions of this Court and other circuit courts of appeals. Thus, Petitioner requests that this Court exercise its supervisory authority and reverse the court of appeals.

CONCLUSION

Wherefore, Premises Considered, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,



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Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that I have this date served three (3) copies each of the foregoing Petition for Writ of Certiorari upon the First State Bank of Clay County (formerly State Bank of Lineville), by mailing true and correct copies of the same correctly addressed, and with sufficient postage affixed thereto, to the following counsel:

Thomas Reuben Bell
223 North Norton Avenue
Sylacauga, Alabama 35150

James J. Odom, Jr.
P.O. Box 11244
Birmingham, Alabama 35202-1244

This 6th day of March, 1987.

Ben F. Easterlin IV

Ben F. Easterlin IV
Attorney for Petitioner

APPENDIX A

The opinion of the Court of Appeals:

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 86-7371

FIRST TEAM AUCTION, Etc., DO NOT PUBLISH

Plaintiff-Appellant,

versus

FIRST STATE BANK OF
LINEVILLE, etc.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

Before RONEY, Chief Judge, JOHNSON, Circuit Judge, and ESCHBACH*, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

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*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

APPENDIX B

The opinion of the district court:

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

FIRST TEAM AUCTION, INC.,	)	
PLAINTIFF,	)	
VS.	)	CV85-H-2383-E
FIRST STATE BANK OF CLAY COUNTY,	)	
DEFENDANT.	)	

MEMORANDUM OF DECISION

This cause is before the court on the motion of defendant for summary judgment in its favor on the complaint. The factual background of this case is presented in the court's order entered January 3, 1986, and will not be reiterated in detail here.

This action arises out of a transaction between plaintiff and defendant culminating in an agreement executed July 21, 1983. On September 6, 1985, plaintiff filed this suit, claiming to have been defrauded by defendant in the July 1983 transaction. Defendant's main asserted ground for summary judgment is that plaintiff's claim herein is time barred.

Three Alabama statutes are relevant here. Before 1985, fraud claims in Alabama were governed by the one-year statute of limitations in Ala. Code §6-2-39(a)(5) (1975) (repealed by Act No.85-39, 1984-85 Ala. Acts (2nd Special Sess.) 40). Effective January 9, 1985, such claims fall under the two-year statute prescribed by Ala. Code §6-2-38(1) (Supp. 1985). The final statute that is critical here is Ala. Code §6-2-3 (1975 and Supp. 1985), which tolls the statute of limitations on a fraud claim until such time as

the plaintiff should with reasonable diligence have discovered the fraud. (Before January 9, 1985, a party plaintiff had one year from the date the fraud should have been discovered to bring suit. Act No. 85-39, supra, extended that time to two years, effective January 9, 1985).

The parties are in agreement that plaintiff gains the benefit of the two-year statute if it could not with reasonable diligence have discovered its fraud claim before January 9, 1984. See Tyson v. Johns-Manville Sales Corp., 399 So. 2d 263, 268-69 (Ala. 1981) (legislature may extend limitations period for existing claim, so long as claim was not already time barred at the time of the legislative action). Thus, the crucial inquiry here is whether plaintiff's alleged fraud claim arose before January 9, 1984. If it arose before that date, it would have been time barred under §6-2-39(a)(5) well before this suit

was filed. If it arose on or after that date, plaintiff gained the benefit of §6-2-38(1) and the amended §6-2-3 and obtained an extra year in which to file suit.

As an initial proposition, it must be noted that, but for §6-2-3, plaintiff's claim would have arisen in July 1983, the time of the alleged fraud, and thus would have been time barred over a year before this suit was filed. The burden is on plaintiff to show that it should not have discovered defendant's alleged fraud until such time as to make the filing of suit timely under §6-2-3. See Amason v. First State Bank, 369 So. 2d 547, 550 (Ala. 1979). In order to prove the applicability of § 6-2-3, plaintiff must show not merely that it was ignorant of the facts underlying the alleged fraud, but rather that its ignorance was "superinduced by the fraud of the [defendant] in the form of active concealment,

conduct calculated to mislead, or to prevent inquiry and lull into repose." Peters Mineral Land Co. v. Hooper, 208 Ala. 324, 329, 94 So. 606 (1922). Of course, the statute begins to run notwithstanding §6-2-3 from the time the alleged fraud should have been discovered, not from the time of actual discovery. Johnson v. Shenandoah Life Insurance Co., 291 Ala. 389, 397, 281 So. 2d 636 (1973).

Here, the undisputed facts show that plaintiff bought mortgages from defendant in July 1983. It planned to sell the lands covered by those mortgages (the "mortgaged lands") in the spring of 1984, after selling other lands owned by the mortgagor in July 1983. The auction of the bulk of the mortgaged lands actually took place in August 1984, after a lawsuit wherein defendant here sought and obtained specific performance of plaintiff's agreement to buy the

mortgages, which lawsuit was resolved in December 1983, and after protracted negotiations in the Bankruptcy Court for this district over the release of the mortgaged lands from the estate of the bankrupt mortgagor. At the August 1984 auction, the mortgaged lands brought in an amount considerably less than their appraised value under the appraisal plaintiff now says was fraudulent.

Further, it appears that plaintiff had sold some 40 acres of the mortgaged lands as part of Tract R-4 in the July 1983 auction. This tract, along with other tracts adjoining some of the mortgaged lands, sold at auction for $350 per acre, again apparently less than the appraised value on which plaintiff purportedly relied. The purchaser of Tract R-4 was, in fact, the agent of plaintiff.

To judge from its financial statements and

its activities, as reflected by the court record, plaintiff is a sophisticated corporation with considerable experience in the purchase, sale and development of real estate. Plaintiff had had its representatives on the mortgaged lands by July 1983, at least to the extent necessary to include photographs and information on the mortgaged lands in promotional materials for the July 1983 auction and to sell (and indirectly purchase) Tract R-4 in the July 1983 auction. Plaintiff was engaged in litigation over its contract to buy the mortgages throughout the fall of 1983. Nonetheless, plaintiff says it could not have discovered the alleged fraud in 1983, nor even after the August 1984 auction. Rather, it maintains that it discovered the alleged fraud only after contact with the mortgagor in May 1985.

This argument will not hold water. Of

course, it is only important whether plaintiff should have discovered the alleged fraud before January 9, 1984, not whether its actual discovery did not occur before May 1985. On this point, the court must reiterate that plaintiff is a sophisticated corporation claiming to have been defrauded in a transaction of the kind in which it regularly engages, not a naive individual of whom an overbearing entity has taken advantage.

While disputes as to when a party plaintiff should have known of a fraud may ordinarily be left to the jury, it is clear that in some circumstances there may be no genuine dispute in light of the identities and activities of the parties, so that the matter may be resolved in a defendant's favor without trial. See, e.g., Hunt v. American Bank & Trust Co., 783 F.2d 1011, 1014 (11th Cir. 1986). Further, it is settled that §6-2-3 does not relieve a party plaintiff of

diligence in the discovery of fraud, but rather that it requires that fraudulent concealment of the existence of the fraud be plead and proven. Sellers v. A.H. Robins Co., 715 F.2d 1559, 1561-62 (11th Cir. 1983).

The present case appears to be squarely within the rule of Taylor v. South & North Alabama Railroad Co., 13 F. 152, 159 (C.C.M.D.Ala. 1882), holding that a predecessor statute to §6-2-3

> . . . certainly does not absolve a party from all effort or diligence to obtain knowledge of the facts constituting the fraud complained of. The statute certainly was not intended [to] and did not change the rule of equity upon the subject of diligence in such cases, and thus benefit those only who might be willfully ignorant, or who, from carelessness and indifference, should neglect to avail themselves of the means of information on the subject.
>
> * * *
>
> . . . There must, then, be some dis-

> position and effort to obtain a knowledge of the facts, and that is what the law calls reasonable diligence. The question is not what facts the complainant actually knew, but of what facts might he have obtained knowledge had he sought it from the natural sources of information which were at his command.

Here, plaintiff was experienced in real estate matters. For the latter half of 1983 it was engaged in negotiations and litigation regarding the mortgaged land. The mortgaged land was in its control from July 1983 on, and in July 1983 it auctioned off and bought for its own account 40 acres of the mortgaged land. Plaintiff had ample access to information it needed to discover the alleged fraud, and ample time and reason to use that information. Its failure to do so shows that it lacked the diligence required to claim the benefit of §6-2-3.

On this record, it is apparent as a matter of law that plaintiff should have known of defen-

dant's alleged fraud before January 9, 1984, and thus that this action became time barred before January 19, 1985. Accordingly, defendant's motion for summary judgment in its favor will be granted, and a separate order dismissing the complaint with prejudice will be entered.

DONE this 24th day of April, 1986.

UNITED STATES DISTRICT JUDGE

APPENDIX C

Excerpts from affidavit submitted by Carlus D. Gay, Jr., Petitioner's President, dated November 4, 1985:

"Upon obtaining the agreement of Hooton's suppliers and lenders to allow an auction of Hooton's timberland without reserve, Hooton and First Team entered into an auction contract for sale of approximately 3,000 acres, none of which was included in the mortgage of First State Bank of Lineville, in July, 1983 and a second auction, consisting of property included in the mortgage to First State Bank of Lineville in the spring of 1984. . . ." (emphasis added) R1-11-4.

"This property was significantly different in character from the approximately 3,000 acres of

Hooton timberland which was to be sold in the July, 1983 auction. None of that property was lake front property, and it was scattered tracts of hillside timberland. In contrast, the property on which First State Bank of Lineville held a mortgage was subdivision development type property around the lake." R1-11-6.

"First Team Auction had never sold any water front property in Alabama at that time, and in fact, to the best of my knowledge and recollection had not sold any real property in Alabama before the Hooton auction" R1-11-6.
At the time of these negotiations, First Team had not had the opportunity to cruise, appraise or thoroughly inspect the property to determine its value; but First Team had seen most of the property. Nothing about the appearance of the water front property indicated that it was of any

less value than specified in the aforementioned appraisal. Actually, the water front property looked to be attractive subdivision development property and only someone familiar with values and comparable sales in that particular area would have had any reason to know that this property was not worth as much as indicated in the appraisal." R1-11-6.

APPENDIX D

Excerpts from affidavit of Carlus D. Gay, Jr., Petitioner's President, dated February 14, 1986:

". . . Hooton drove the First Team representative around to see as much of the 3,000 acres of timberland as possible. During this cursory inspection, Hooton also pointed out some of the lake front property. However, Hooton did not show the First Team representative all of the lake front property, and none of the lake front property was inspected closely at this time as Hooton and the First Team representative had too much territory to cover in a few hours. R1-14-2.

. . . Furthermore, no representative of First Team spent any time at all before the July 23,

1983 auction on or inspecting the lake front property which was to be the subject of a later auction. Also, because of its involvement with the upcoming July 23, 1983 auction, First Team had no opportunity and did not visit or inspect the lake front property from July 5, 1983, the time it began its negotiations with First State Bank of Lineville regarding the purchase of the Hooton mortgage on such property, until the July 23, 1983 auction. As a result, First Team had to and did, rely entirely upon the representatives by the bank as to the value of the lake front property during these negotiations. R1-14-3.

. . . and no representative of First Team had any involvement with or performed any inspection of the lake front property in any way between July 23, 1983 and the spring of 1984. R1-14-4.

In the spring of 1984, First Team began for the first time to plan for an auction of the lake front property, and First Team representatives saw all of the lake front property for the first time. Prior to spring 1984, no First Team personnel had thoroughly inspected the lake front property at all, and the only contact with such properties was one or two occasions when a First Team representative saw some of the tracts while preparing for the July, 1983 auction. Even though plans for the lake front auction began in the spring of 1984, no actual work on the property was undertaken until July due to the lack of the Bankruptcy Court's approval of the sale until that time. R1-14-4.